Office Supreme Court, U.S.
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84-554

CASE NO.

in the Supreme Court of the United States

INDUSTRIA NACIONAL DEL PAPEL, CA.,
Respondent,

vs.

M/V "ALBERT F", *In Rem,*
Petitioner

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, ELEVENTH CIRCUIT

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1848

QUESTIONS PRESENTED FOR REVIEW

I

WHAT CRITERIA, IF ANY, SHOULD THE COURTS USE TO INTERPRET THE INCONSISTENT STATUTORY RESULTS OBTAINED WHERE AN INNOCENT OCEAN CARRIER IS PROHIBITED BY SECTION 22 OF THE POMERENE ACT FROM IMPEACHING A BILL OF LADING, BUT IS IMMUNE FROM LIABILITY BY REASON OF SECTION 1304(5) OF THE CARRIAGE OF GOODS BY SEA ACT, WHERE THE NATURE AND VALUE OF THE GOODS SHIPPED HAVE BEEN KNOWINGLY AND FRAUDULENTLY MISSTATED BY THE SHIPPER IN THE BILL OF LADING?

II

CONSIDERING THAT SECTION 22 OF THE POMERENE ACT CODIFIES THE COMMON LAW ESTOPPEL PRINCIPLE THAT A CARRIER IS ESTOPPED FROM IMPEACHING A FALSE BILL OF LADING AS AGAINST A HOLDER IN DUE COURSE, IS A VESSEL SIMILARY ESTOPPED BY REASON OF SECTION 22, AND LIABLE *IN REM*, EVEN THOUGH THE GOODS DESCRIBED IN THE BILL OF LADING WERE NEVER RECEIVED BY OR DELIVERED TO THE VESSEL OR ITS AUTHORIZED AGENT?

LISTING OF PARTIES TO THE PROCEEDING

1. Industria Nacional Del Papel CA

2. Fairwind Container Express, Ltd.

Arthur Hunter

Ian Boxall

Edgar Woods

M/V ALBERT F

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REFERENCES TO REPORTS AND OPINIONS

The opinion sought to be reviewed of the United States Court of Appeals for the Eleventh Circuit is reported at 730 F.2d 622 (11th Cir. 1984), and appears in the Appendix to this Petition. (A.10-22).

JURISDICTIONAL STATEMENT

The opinion of the lower court was entered on April 20, 1984 and rendered upon denial of rehearing on July 9, 1984. Certiorari has been instituted pursuant to 28 U.S.C. 1254 (1); 28 U.S.C., Supreme Court Rules, Part V, Rules 19, 20 and 21.

The Petitioner believes this Honorable Court should exercise its certiorari discretion as this case presents:

A. A substantial federal question involving the construction and application of the Pomerene Act and the Carriage of Goods by Sea Act;

B. An appellate court decision which has decided important questions of law which have not been, but should be settled by the Supreme Court of the United States.

STATUTES INVOLVED IN THE CASE

Statutes cited in the opinion sought to be reviewed and in this Petition are the following:

1. Section 1304(5), of the Carriage of Goods by Sea Act (COGSA), 46 U.S.C.A. Section 1300-1315 (West 1975).

"Amount of liability; valuation of cargo

(5) * * * *

Neither the carrier nor the ship shall be responsible in any event for loss or damage to or in connection with the transportation of the goods if the nature or value thereof has been knowingly and fraudulently misstated by the shipper in the bill of lading."

2. Section 1303(4), COGSA:

"Bill as prima facie evidence

(4) Such a bill of lading shall be prima facie evidence of the receipt by the carrier of the goods as therein described in accordance with paragraphs (3)(a), (b) and (c), of this section: *Provided*, That nothing in this chapter shall be construed as repealing or limiting the application of any part of sectons 81 to 124 of Title 49."

3. Section 22 of The Federal Bills of Lading (Pomerene) Act, 49 U.S.C.A. 81-124 (West 1951).

"Section 102. Liability for nonreceipt or misdescription of goods.

If a bill of lading has been issued by a carrier or on his behalf by an agent or employee the scope of whose actual or apparent authority includes the receiving of goods and issuing bills of lading therefor for transportation in

commerce among the several States and with foreign nations, the carrier shall be liable to (a) the owner of goods covered by a straight bill subject to existing right of stoppage in transitu or (b) the holder of an order bill, who has given value in good faith, relying upon the description therein of the goods, or upon the shipment being made upon the date therein shown, for damages caused by the nonreceipt by the carrier of all or part of the goods upon or prior to the date therein shown, or their failure to correspond with the description thereof in the bill at the time of its issue."

STATEMENT OF THE CASE AND FACTS

The Respondent, INDUSTRIA NACIONAL DEL PAPEL (INDUSPAPEL) ordered 1500 metric tons of *soft wood kraft pulp* from SANCA STEEL CORPORATION (Sanca), the Shipper. In February, 1979, Sanca delivered and had loaded aboard the M/V "ALBERT F" 505 bales of *waste paper.* Sanca's freight forwarder prepared a clean on-board bill of lading—which was signed by the Charterer—describing the cargo as 1035 bales of soft wood kraft pulp. The vessel sailed the following day and on the same date, INDUSPAPEL paid Sanca $324,746.11. Upon arrival in the Dominican Republic, the M/V ALBERT F delivered the 505 bales of practically worthless waste paper.

INDUSPAPEL sued the M/V ALBERT F *in rem* in the United States District Court for the Southern District of Florida for the non-delivery of the 1035 bales of soft wood kraft pulp, as described in the bill of

lading. Although the District Court found that the shipper Sanca defrauded everyone involved with the shipment by loading worthless cargo aboard the M/V ALBERT F, without any knowledge or participation therein by the vessel owner, her master, or charterer, the M/V ALBERT F was held to be estopped from impeaching the terms of the bill of lading. Accordingly, the District Court held the M/V ALBERT F liable *in rem* to INDUSPAPEL for the non-delivery of the cargo specified in the bill of lading. The claim was within the admiralty and maritime jurisdiction of the District Court. 28 U.S.C. 1333. (A.7)

FAIRWIND CONTAINER EXPRESS, LTD. as claimant/owner of the M/V ALBERT F, appealed to the Court of Appeals for the Eleventh Circuit which affirmed the final judgment of the District Court. (A.10-22) A timely petition for rehearing and/or suggestion for rehearing on banc was thereafter denied. (A.23-24)

ARGUMENT

The Eleventh Circuit has decided important issues of Federal (maritime) law which have not been, but should be settled by the Supreme Court. The opinion sought to be reviewed holds that a vessel is estopped to impeach a bill of lading fraudulently prepared by the Shipper, in spite of the fact that COGSA Section 1304(5) specifically exonerates a vessel from liability where the nature of the goods is "fraudulently and knowingly misstated by a shipper in the bill of lading." This Honorable Court should have in mind that the vessel and her owners were defrauded by the shipper; that respondent INDUSPAPEL itself chose to deal with this shipper; and that the vessel and her owners were blameless.

The holding is premised upon the construction and application of the Federal Bills of Lading (Pomerene) Act, 49 U.S.C.A. 81-124 (West 1951), as decided by the Eleventh Circuit.

Petitioner submits that the construction and application of the Act to the facts in this case was not only legally erroneous but also far exceeded the legislative intent and purpose of the Act. The practical result is that there now exists arbitrary and conflicting standards of care that are to be imposed on carriers and vessels in foreign trade, simply depending upon the location of the port of issuance of the bill of lading.

I

No authority has been previously cited, nor has any been found, that is squarely on point with the facts in this case or that supports the decision of the Eleventh Circuit. Indeed, with respect to the estoppel issue, the cases cited and relied upon by the Eleventh Circuit in the opinion sought to be reviewed are clearly inapplicable, both factually and legally. *See, Elgie & Co. v. S.S.S.A. NEDERBURG*, 599 F.2d 1177 (2d Cir. 1979), *cert. den. sub nom, South African Marine Corp., Ltd. v. Elgie & Co.*, 444 U.S. 1972, 100 S.Ct. 1016 (1980); *Strohmeyer and Arpe Co. v. American Line SS Corp.*, 97 F.2d 360 (2d Cir. 1938). Very simply, neither one of these cases involved the *in rem* liability of the vessel, as in this case. While it is conceded that as a general statement of the law, a "carrier", as against a holder in due course, is bound by the description of cargo in a clean bill of lading and is estopped to show that the cargo receipted for was in fact of a different kind, quality and quantity, *Cummins Sales and Service, Inc. v. London*

and Overseas Insurance Company, 476 F.2d 498 (5th Cir. 1973); 49 U.S.C.A. Sec. 102, this is far from a sufficient premise in which to conclude that a *vessel* will be similarly bound even where the cargo as described in the bill of lading is *never even delivered to or received by the vessel.*

To hold otherwise, as did the Eleventh Circuit in this case, is to ignore the very concept of the maritime lien. The long established principle as set forth by the Supreme Court is that the law does not bind the vessel as security for the performance of the contract to transport cargo until a lawful contract of affreightment is made, and the cargo to which it relates has been received by or delivered to the vessel or its authorized agent. *Keokuk*, 76 U.S. 517, 519 (1870). Until such time that the cargo that is described in the bill of lading is "delivered" the contract remains unexecuted and the remedy for any breach is *in personam* only. Gilmore and Black, *The Law of Admiralty* (2d Ed.) Ch.9, p. 635. In short, the mere issuance of the bill of lading, without more, does not bind the vessel as security for the performance of the contract, but rather, there must be "union of ship and cargo". *Krauss Brothers Lumber Co. v. Dimon S.S. Corp.*, 290 U.S. 117, 54 S.Ct. 105 (1933); *Osaka Shosen Kaisha v. Pacific Export Lumber Company*, 260 U.S. 490, 43 S.Ct. 172 (1922).

In this case, there was no such "union of ship and cargo" because the cargo that was described in the bill of lading—1,035 bales of soft wood kraft pulp—was never delivered to or received by the vessel or its agent. The Eleventh Circuit held otherwise; that the vessel was estopped (by reason of Sec. 22 of the Pomerene Act) from showing the non-receipt and/or non-delivery

of these goods, and, the maritime lien therefore attached when the (wrong) goods were loaded on the vessel.

Section 22 codifies the common law estoppel principle, *Portland Fish Company v. States Steamship Company*, 510 F.2d 628 (9th Cir. 1974), that has been applied in cases finding a vessel liable *in rem*. However, in each case, the fundamental basis for finding the vessel liable was finding that there was "union of ship and cargo". Thus, in *Demsey and Associates v. S.S. SEA STAR*, 461 F.2d 1009 (2d Cir. 1972) the vessel "became liable to the Plaintiffs once the coils were aboard". *Id.* at 1015. Similarly, in *Olivier Straw Goods Corporation v. Osaka Shosen Kaisha*, 27 F.2d 129 (2d Cir.), *cert. den.*, 278 U.S. 618, 49 S.Ct. 22 (1928), even though the cargo was not actually loaded on the vessel, the vessel was held to be estopped to impeach the bill of lading because the cargo had been actually delivered into the hands of the vessel's agent. *Id.* at 133. *See also, THE CAPITAINE FAURE*, 10 F.2d 950 (2d Cir. 1926) (Vessel became bound by the description of the cargo in the bills of lading *after* the subject cargo was loaded aboard the vessel). *Compare, THE FREEMAN v. Buckingham*, 18 HOW. 182, 15 L.Ed. 341 (1856), where notwithstanding the issuance of a false bill of lading and the detrimental reliance by the *bona fide* holder thereof, the Supreme Court held the vessel not to be estopped and thus not liable *in rem* for the non-delivery of the cargo described in the bill of lading *because the cargo was in fact never delivered to or received by the vessel.*

The same results should logically obtain for shipments subject to the Pomerene Act, to the extent that Section 22 has been construed to impose the same standards of care respecting the issuance of bills of

lading that govern the rights (and liabilities) of parties to bills of lading issued in a foreign port. *Portland Fish Company, supra*, 510 F.2d at 632; *Elgie & Co., supra*, 599 F.2d at 1180. Otherwise, there would exist a significant inconsistency in the law respecting the issuance of bills of lading simply dependent upon the location of the port of their issuance. The Eleventh Circuit Opinion sought to be reviewed in this case creates such an inconsistency.

II

Furthermore, in finding that the District Court was correct in holding the M/V ALBERT F liable *in rem* for the non-delivery of the proper cargo, the Eleventh Circuit ignored the express provision of Section 1304 (5) of the Carriage of Goods by Sea Act (COGSA), 46 U.S.C.A. Section 1300-1315 (West 1975). In pertinent part, that section immunizes the carrier and the vessel from liability in the event of "loss or damage to or in connection with the transportation of the goods if the nature or the value thereof has been knowingly and fraudulently misstated by the shipper in the bill of lading".

The District Court had specifically found that the shipper SANCA defrauded every one concerned in this transaction by preparing the false bill of lading and commercial invoice, delivering the worthless cargo to the vessel in containers, which the carrier was not able to exercise, and thereafter arranging for and supervising the loading aboard the vessel. These findings were not disturbed upon appeal by the Eleventh Circuit. In sum, the sole cause of the loss was the action of the shipper

by, among other things, "knowingly and fraudulently" misstating the nature of the goods in the bill of lading.

Clearly, under such circumstances, the M/V ALBERT F should be entitled to complete exoneration by reason of COGSA Sec. 1304 (5). In *LA FORTUNE v. S.S. IRISH LARCH*, 1974 A.M.C. 444 (S.D. N.Y. 1973), *aff'd*, 503 F.2d 952 (2nd Cir. 1974), the vessel interests were completely exonerated because "the shipper knowingly misstated the nature and value of the shipment" (1974 A.M.C. at 445). It is submitted that the Pomerene Act does not sanction a contrary result.

The express legislative intent in enacting the Pomerene Act was to improve the negotiability of bills of lading. COGSA was enacted against the backdrop of the Pomerene Act and one of the primary purposes of COGSA, was the establishment of uniformity in bills of lading. *Portland Fish Company, supra*, 510 F.2d at 631. This legislative intent is evidenced by the proviso contained in COGSA Sec. 1303 (4) which expressly prohibits a construction of Section 1303—dealing with the responsibilities and liabilities of carrier and vessel—which would limit or repeal the effect of the Pomerene Act. *Portland Fish Company, supra*, 510 F.2d at 632.

However, the same express qualification—limitation—was not similarly provided for in COGSA Sec. 1304, which governs the rights and immunities of the carrier and vessel. The Eleventh Circuit opinion sought to be reviewed, in effect, has rewritten that provision and the practical result is clear: Whereas, for shipments originating in foreign ports destined for a port in the United States, a carrier and/or vessel will be immune from liability for loss or damage if the

nature or value of the cargo has been fraudulently misstated by the shipper in the bill of lading, *LA FORTUNE v. S.S. IRISH LARCH, supra;* for shipments originating in the United States, the same immunity is not afforded to the carrier and/or vessel. *Industria Nacional del Papel C.A. v. M/V ALBERT F,* 730 F.2d 622 (11th Cir. 1984).

III

The consequence of the Eleventh Circuit opinion sought to be reviewed is significant and far-reaching. It effectively abrogates the intrinsic concept of the maritime lien, and with the same broad stroke, establishes a conflict between the Pomerene Act and COGSA where one was never intended. In sum, there are now different standards of care imposed upon carriers and vessels depending solely upon the location of the port of issuance of the bill of lading.

The Petitioner would suggest that given these circumstances, a review of the Eleventh Circuit opinion is therefore necessary, not only to re-establish uniformity in the law respecting issuance of bills of lading, but also to express clear guidelines in defining the rights, duties and liabilities of carriers and vessels in foreign trade.

CONCLUSION

Based upon the foregoing reasons and citations of authority, the Petitioner respectfully urges this Honorable Court to take jurisdiction of the instant cause, to review the instant cause on the merits, and to enter such other relief as this Court deems advisable under the circumstances.

Respectfully submitted,

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Attorneys for Petitioner

BY: 
JOHN D. KALLEN

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have, on this 28th day of September, 1984, mailed a copy of the above Petition to Luis Bustamonte, Stinson, Lyons & Schuette, P.A., Attorneys for the Respondent, INDUSPAPEL, Ninth Floor, 1401 Brickell Avenue, Miami, Florida 33131.

JOHN D. KALLEN

Appendix

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[FILED FEB 17 1982]

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 79-6137-CIV-JE

INDUSTRIA NACIONAL DEL PAPEL C. POR A.,
a Dominican Republic corporation,
Plaintiff,

v.

M/V "ALBERT F" in rem and
STRAUM STEAMSHIP CO., LTD.,
Defendant.

PARTIAL FINDINGS OF FACT AND CONCLUSIONS OF LAW

THIS CAUSE was tried before the Court, non-jury, on November 2 and 3, 1981. Upon consideration of the evidence presented, the Court enters the findings of fact and conclusions of law that follow.

FINDINGS OF FACT

1. The Plaintiff, INDUSTRIA NACIONAL DEL PAPEL C. POR A. (INDUSPAPEL, hereinafter), was incorporated under the laws of the Dominican Republic and has its only place of business in the Dominican Republic. The Defendant vessel, the M/V "ALBERT F", is and was during the first three months of 1979, engaged in the carriage of goods by water for hire. The Defendant vessel is owned by FAIRWIND CONTAINER

EXPRESS, LTD. (FAIRWIND, hereinafter), a corporation incorporated under the laws of the Cayman Islands.

2. By written purchase order dated January 9, 1979, INDUSPAPEL ordered 1500 metric tons of softwood kraft pulp from the Intervening Plaintiff, SANCA STEEL CORPORATION (SANCA, hereinafter), for the total purchase price of $569,790.00. In order to pay for the softwood kraft pulp, INDUSPAPEL obtained the issuance of an irrevocable letter of credit by the Banco de Reservas de la Republica Dominicana of Santo Domingo, Dominican Republic.

3. Banco de Reservas issued its irrevocable letter of credit no. 1-79-0034, dated January 12, 1979, in favor of SANCA in the amount of $569,790.00, which was payable upon presentation of sight drafts drawn on the Irving Interamerican Bank in Miami, Florida, accompanied by full sets of clean on board ocean bills of lading evidencing shipment of the softwood kraft pulp and the other documents specified in the letter of credit. The letter of credit permitted SANCA to make partial shipments of the goods.

4. The Defendant, STRAUM STEAMSHIP CO., LTD. (STRAUM, hereinafter), was incorporated under the laws of the Cayman Islands and its principal place of business is in the Cayman Islands. By written agreement with FAIRWIND, STRAUM time chartered the M/V "ALBERT F" for use in the carriage of goods by water for a period of three months commencing on January 12, 1979. During the period of the time charter, the vessel was under the direction and control of STRAUM.

5. Paragraph 9 of the time charter agreement provided that the master of the M/V "ALBERT F" (who was furnished and paid by FAIRWIND) was under the orders of STRAUM as regards employment, agency or other arrangements. STRAUM handled the issuance of all bills of lading during the time charter period. STRAUM agreed to indemnify FAIRWIND against all liabilities arising from the execution of bills of lading by the master or agents appointed by the time charterer.

6. On February 2-8, 1979, cargo supplied by SANCA destined for INDUSPAPEL in the Dominican Republic was loaded aboard the M/V "ALBERT F" at Port Laudania in the Southern District of Florida. For the carriage of that cargo, STRAUM issued, on behalf of the master and the vessel, a clean on board bill of lading for 1,035 bales of softwood kraft pulp, consisting of 854.91 metric tons, consigned to Banco de Reservas. STRAUM charged $68,210.00 for transporting the cargo to the consignee.

7. The M/V "ALBERT F" sailed on February 12, 1979 with the cargo being transported pursuant to the clean on board bill of lading. On the same date, SANCA presented the original clean on board bill of lading, its commercial invoices in the amount of $324,746.11 (for 1,035 bales of softwood kraft pulp, consisting of 854.91 metric tons) and the other required documents to Irving Interamerican Bank in Miami, Florida for payment under the letter of credit. The amount of the invoice included STRAUM's freight charges of $68,210.00.

8. Irving Interamerican Bank paid the $324,746.11 under the letter of credit in the following manner, pursuant to SANCA's directions:

(a) $233,774.80 to Sunshine Pulp & Paper Company;

(b) $68,210.00 to STRAUM; and

(c) $22,761.31 to SANCA.

Irving Interamerican Bank then forwarded the clean on board bill of lading and the other documents to Banco de Reservas and obtained reimbursement of the $324,746.11 it funded. In turn, Banco de Reservas charged INDUSPAPEL's account the sum of $324,746.11. In order to satisfy its obligation, INDUSPAPEL executed a promissory note in that amount in favor of Banco de Reservas. The bank then transferred the clean on board bill of lading and the other original documents and assigned its rights as consignee under the bill of lading to INDUSPAPEL.

9. Other than the matters set forth on the bill of lading, the commercial invoices and the other documents upon which they relied, neither the banks nor INDUSPAPEL had any knowledge of the circumstances surrounding the loading of the cargo aboard the M/V "ALBERT F" or the issuance of the bill of lading.

10. The M/V "ALBERT F" arrived at Port Haina, Dominican Republic on February 19, 1979. Upon its arrival, the vessel did not deliver the softwood kraft pulp described in the clean on board bill of lading. Instead, it outturned 505 bales of waste paper consisting of a weight less than 854.91 metric tons. The cargo that the consignee (Induspapel) received was practically worthless.

11. As of the time of trial, INDUSPAPEL had not received the softwood kraft pulp nor had it received payment of the $324,746.11 paid under the letter of credit to SANCA.

12. The M/V "ALBERT F" was originally arrested in this cause by SANCA (the original Plaintiff), which claimed to have acted on behalf of INDUSPAPEL. The vessel was released upon FAIRWIND's posting of the sum of $344,500.00 as substitute security, which is evidenced by a certificate of deposit held by the Clerk of this Court. INDUSPAPEL was substituted for SANCA as the proper party Plaintiff on April 30, 1980.

13. The Shippers Export Declaration was prepared by the agent of the Time Charterer (STRAUM). The vessel owner did not know that the cargo shipped was not that which was ordered by the consignee.

The Time Charterer (STRAUM) signed, at the request of the shipper (SANCA) a bill of lading which was delivered to the vessel's master while the vessel was at anchor off the coast awaiting delivery of the shipping documents. The vessel was so anchored in order not to miss a tide and thus have its sailing delayed. Upon delivery of the documents, the vessel sailed.

14. The Bill of Lading issued by the Time Charterer, contained the following statement:

> "PARTICULARS FURNISHED BY SHIPPER" (in bold print) and additionally that the shipper, consignee and owner of the goods were bound by all the printed provisions on both sides of

the Bill of Lading, including paragraphs 2, 3, 4, 11 and 20."

15. The shipper, SANCA, committed fraud upon all concerned. The shipper's representatives managed to place worthless cargo on the vessel and arranged documentation. When the shipper's representatives drew on the letter of credit they disappeared and they have not since been seen.

CONCLUSIONS OF LAW

1. The subject matter of this cause is within the admiralty and maritime jurisdiction of the Court. 28 U.S.C. §1333.

2. Title to the cargo, which was shipped C.I.F., passed upon SANCA's delivery of it to the M/V "ALBERT F". Therefore, INDUSPAPEL, as the assignee of the named consignee and the holder of the clean on board bill of lading, is the real party in interest and the proper party Plaintiff in this cause.

3. By the express provisions of the time charter agreement, STRAUM was authorized to issue the clean on board bill of lading on behalf of the master of the vessel. The M/V "ALBERT F" is bound by the clean on board bill of lading and INDUSPAPEL is entitled to a maritime lien for the breach of that contract of carriage.

4. Since the $324,746.11 paid SANCA under the letter of credit was funded in reliance upon the description contained in the clean on board bill of lading, the M/V "ALBERT F" and STRAUM are estopped, as against INDUSPAPEL, impeaching the clean on board bill of

lading; that is, from relying on proof that goods other than those described in the clean on board bill of lading were loaded aboard the vessel and transported to the Dominican Republic.

5. By sailing with the cargo shipped pursuant to the clean on board bill of lading, for which STRAUM received payment of transportation charges, the bill of lading was ratified by the Defendants and this Court has *in rem* jurisdiction.

6. STRAUM breached the contract of carriage by failing to deliver goods conforming to those described in the clean on board bill of lading and INDUSPAPEL is entitled to judgment against STRAUM, *in personam*, in the amount of $324,746.11, together with interest and taxable costs.

7. INDUSPAPEL has a valid maritime lien against the M/V "ALBERT F" for its failure to deliver goods conforming to those described in the clean on board bill of lading and INDUSPAPEL is entitled to judgment directing payment from the substituted security for the vessel of its maritime lien in the amount of $324,746.11, together with interest and taxable costs.

8. FAIRWIND is entitled to recovery against STRAUM and SANCA.

9. STRAUM is entitled to recovery against SANCA.

10. SANCA is entitled to no recovery.

11. No party is entitled to recovery against INDUSPAPEL.

DONE and ORDERED at Miami, Southern District of Florida, this 16th day of February, 1982.

Joe Eaton

United States District Judge

cc: Robert J. Schaffer, Esq.
Reginald M. Hayden, Jr., Esq.
William Sayad, Jr., Esq.
David Canning, Esq.

INDUSTRIA NACIONAL DEL PAPEL, C.A.,
Plaintiff-Appellee
Cross-Appellant,

Sanca Steel Corporation, Intervening
Plaintiff,

Fairwind Container,
Counter Claimant-Appellant,
Cross-Appellee,

v.

M/V "ALBERT F", In Rem, etc.,
Defendant

Sanca Steel Corporation, et al.,
Counter Defendants.

NO. 82-5865.

United States Court Of Appeals,
Eleventh Circuit.

April 20, 1984.

Buyer of goods brought in rem action against vessel to recover for nondelivery of goods. The United States District Court for the Southern District of Florida, Joe Eaton, Chief Judge, entered judgment in favor of buyer, and vessel appealed. The Court of Appeals, Hatchett, Circuit Judge, held that: (1) vessel was "carrier" within meaning of Carriage of Goods by Sea Act and Pomerene Act; (2) vessel was liable for nondelivery of goods under

Pomerene Act; (3) statements in bill of lading were insufficient to escape liability for nondelivery of goods under Pomerene Act; (4) loading of cargo on vessel created maritime lien enforceable in rem; (5) mistake concerning parties' opinions concerning duration of litigation was insufficient to compel vessel owner to post additional security; and (6) buyer could not obtain in personam judgment against vessel owner in excess of amount of security posted by vessel owner to secure vessel's release from arrest.

Affirmed.

1. **Shipping—103**

Vessel was "carrier" within meaning of Carriage of Goods by Sea Act and Pomerene Act where vessel transported and discharged cargo, bill of lading was issued for master, and no contractual relationship existed absolving ship and its owner from liability for cargo. Carriage of Goods by Sea Act, §§ 1-16, 46 U.S.C.A. §§ 1300-1315; Bill of Lading Act, §§ 1-44, 49 U.S.C.A. §§ 81-124.

See publication Words and Phrases for other judicial constructions and definitions.

2. **Shipping—115**

Where vessel received certain goods and issued bill of lading describing goods, but goods received did not conform to goods described in bill of lading, vessel was liable under Pomerene Act for nondelivery of goods. Bill of Lading Act, §22, 49 U.S.C.A. §102.

3. Shipping—106(5)

Holder in due course cannot recover under section of Pomerene Act governing liability of carrier issuing bill of lading for nonreceipt of goods unless holder in due course has relied on bill of lading. Bill of Lading Act, §22, 49 U.S.C.A. §102.

4. Shipping—141(1)

Words "particulars furnished by shipper" in bill of lading failed to relieve carrier of liability under Carriage of Goods by Sea Act and therefore did not exempt vessel from liability for nondelivery of goods under Pomerene Act. Bill of Lading Act, §§ 21, 22, 49 U.S.C.A. §§ 101, 102.

5. Shipping—141(1)

Preprinted disclaimer paragraph in bill of lading failed to exempt vessel from liability for nondelivery of goods under Pomerene Act where paragraph did not indicate that shipper loaded cargo. Bill of Lading Act, §§ 21, 22, 49 U.S.C.A. §§ 101, 102.

6. Admiralty—28

Court obtains in rem jurisdiction over vessel when maritime lien attaches to vessel.

7. Shipping—133

Maritime lien attaches against ship when valid claim for cargo loss or damage exists.

8. **Shipping—133**

Right to maritime lien attaches when there is union of ship and cargo and such union will occur when vessel is loaded or at least ready to be loaded.

9. **Shipping—133**

Loading of cargo on vessel created maritime lien enforceable in rem to secure performance of contract.

10. **Admiralty—57**

Effect of release of vessel from arrest in exchange for vessel owner's posting of security was to transfer maritime lien from ship to fund represented by security.

11. **Admiralty—57**

Mistake concerning parties' opinions concerning duration of action against vessel for nondelivery of cargo was insufficient to compel vessel owner, which had posted security in exchange for vessel's release from arrest, to post additional security. Supplemental Admiralty and Maritime Claims Rule E(6), 28 U.S.C.A.

12. **Admiralty—57**

Buyer of goods, which brought in rem action against vessel to recover for nondelivery of goods, could not obtain in personam judgment in excess of amount of security posted by vessel owner to secure vessel's release from arrest where action did not involve any mistake in determination concerning value of vessel.

Hayden & Milliken, Pa., John D. Kallen, William B. Milliken, Miami, Fla., for Fairwind Container.

Robert J. Schaffer, Miami, Fla., for Industria Nacional Del Papel, CA.

Appeals from the United States District Court for the Southern District of Florida.

Before HILL and HATCHETT, Circuit Judges, and ALLGOOD*, District Judge.

HATCHETT, Circuit Judge:

In this action, we must determine whether a vessel may be held liable in rem for non-delivery of its cargo described in a clean on board bill of lading. We affirm the district court which held the vessel liable in rem because it was estopped from impeaching the bill of lading.

On January 9, 1979, the appellee, Industria Nacional Del Papel (Induspapel), ordered 1,500 metric tons of soft wood kraft pulp from Sanca Steel Corporation (Sanca), costing $569,790. In February, 1979, the cargo was loaded aboard the appellant vessel, the M/V ALBERT F, in southern Florida, and the vessel sailed for the Dominican Republic. On the same date, Induspapel paid Sanca.

*Honorable Clarence W. Allgood, U.S. District Judge for the Northern District of Alabama, sitting by designation.

The M/V ALBERT F arrived in Port Haina, Dominican Republic, on February 19, 1979, without the cargo specified in the bill of lading. Instead, it outturned 505 bales of wastepaper. Induspapel received practically worthless cargo, and sued the vessel and its claimant owner, Fairwind Container Express (Fairwind) to recover the amount it paid.

Claiming to be acting on behalf of Induspapel, Sanca originally arrested the M/V "ALBERT F." Subsequently, the vessel was released upon Fairwind's posting of $344,500 as security, and Induspapel was substituted for Sanca as the proper plaintiff. The district court ruled for Induspapel holding that the vessel was estopped from impeaching the clean bill of lading, and therefore, was liable in rem for the non-delivery of the cargo specified in the bill of lading. The M/V ALBERT F contends the district court erred in holding that it was estopped from impeaching the bill of lading and in finding it liable in rem. Induspapel cross-appeals claiming that the district court erred in reducing Induspapel's prejudgment interest award and in denying it an increase in the amount of security posted by Fairwind.

A. Estoppel

The Pomerene Act, 49 U.S.C.A. §81-124 (West 1951), applies to all "[b]ills of lading issued by any common carrier for the transportation of goods . . . from a place in a State to a place in a foreign country . . ." 49 U.S.C.A. §81. The Pomerene Act fails to define "carrier," but the Carriage of Goods By Sea Act (COGSA), 46 U.S.C.A. §1300-1315 (West 1975), defines "carrier" as, "the owner or the charterer who enters into a contract of carriage with a shipper." 46 U.S.C.A. §1301 (West

1975). "Since COGSA was enacted against the backdrop of the Pomerene Act," we will utilize COGSA's definition of "carrier" to determine whether the M/V ALBERT F is "carrier" within the meaning of the Pomerene Act. *Portland Fish Co. v. States Steamship Co.*, 510 F.2d 628, 631 (9th Cir. 1974).

[1] The Fifth Circuit has held that a vessel is a "carrier" as defined in section 1301 of COGSA where (a) the ship transported and discharged cargo; (b) the bil of lading was issued for the master, and (c) no contractual relationship existed absolving the ship and its owner from liability for the cargo. *Compagnie De Navigation, Etc. v. Mondial United Corp.*, 316 F.2d 163, 172-73 (5th Cir. 1963). These factual circumstances exist in this case, and the M/V ALBERT F is a "carrier" within the meaning of COGSA and the Pomerene Act. Since the vessel was a common carrier transporting cargo from the United States to a foreign country, the Pomerene Act applies to this case. 49 U.S.C.A. §81.

Section 22 of the Pomerene Act provides that a carrier issuing a bill of lading will be liable "[to] the holder of an order bill, who has given value in good faith, relying upon the description therein of the goods, . . . for damages caused by the nonreceipt by the carrier of all or part of the goods upon or prior to the date therein shown, or their failure to correspond to their description thereof in the bill at the time of its issue." 49 U.S.C.A. §102 (West 1951). This provision codified the estoppel principal which held "carriers liable to consignees and good faith assignees for value for misrepresentations in their bill of lading." *Elgie & Co. v. S.S. "S.A. Nederburg,"* 599 F.2d 1177, 1179 (2d Cir. 1979), *cert. denied sub nom., South African Marine*

Corp., Ltd. v. Elgie and Co., 444 U.S. 1072, 100 S.Ct. 1016, 62 L.Ed.2d 753 (1980).

[2, 3] Title 49 U.S.C.A. §102 holds the carrier liable for goods receipted for by him but not actually received. *Elgie*, 599 F.2d at 1179; *Strohmeyer & Arpe Co. v. American Line S.S. Corp.*, 97 F.2d 360, 362 (2d Cir. 1938). The M/V ALBERT F received certain goods and issued a bill of lading describing 854 tons of soft wood kraft pulp, but the goods received did not conform to the goods described in the bill of lading.[1] The vessel, therefore, is liable for the non-delivery of the goods pursuant to 49 U.S.C.A. §102. *See Elgie*, 599 F.2d 1177.[2]

The M/V ALBERT F contends, however, that the exculpatory provision of the Pomerene Act, 49 U.S.C.A. §101 (West 1951), exempts it from liability.[3] The vessel

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[1]While Straum actually issued the bill of lading, we conclude that Straum was acting on behalf of the vessel, and therefore, we treat the ship as issuing the bill of lading.

[2]A holder in due course cannot recover from a carrier under 49 U.S.C.A. §102 (1951), unless he has relied on the bill of lading. *See Pacific Micronesian Lines, Inc. v. New Zealand Insurance Co.*, 366 F.2d 333, 335-36 (9th Cir. 1966), *aff'd*, 397 F.2d 236 (9th Cir. 1968). Induspapel relied on the bill of lading. Only after receiving the bill of lading did it pay Sanca. *See also, T.J. Stevenson & Co., Inc. v. 81, 193 Bags of Flour*, 629 F.2d 338, 373-374 (5th Cir. 1980).

[3]Title 49 U.S.C.A. §101 states in pertinent part:

> The carrier may also by inserting in the bill of lading the words 'Shippers weight, load, and count,' or other words of like purport, [to] indicate that the goods were loaded by the shipper and their description of them made by him; and if such statement be true, the carrier shall not be liable for damages caused by the improper loading or by the nonreceipt or by the misdescription of the goods described in the bill of lading . . . .

claims that certain words contained in the bill of lading free them from liability.[4] The bill of lading declares that "particulars [are] furnished by shipper," the bill also states

> the shipper, consignee and owner of the goods and the holder of this bill of lading agree to be bound by all the stipulations, exceptions, and conditions stated herein whether written, printed, stamped, or incorporated on the front or reverse side hereof, as fully as if they were all signed by such shipper, consignee, owner, or holder.

[4] These statements are insufficient to escape liability under 49 U.S.C.A. §101. The words "particulars furnished by shipper" fail to relieve the carrier of liability under COGSA, and therefore, they do not exempt the M/V ALBERT F from liability under the Pomerene Act. *Spanish American Skin Co. v. M.S. Ferngulf*, 143 F.Supp. 345, 349 (S.D.N.Y. 1956), *aff'd*, 242 F.2d 551 (2d Cir. 1957); *George F. Pettinos, Inc. v. American Export Lines, Inc.*, 68 F.Supp. 759, 764 (E.D.Pa. 1946), *aff'd*, 159 F.2d 247 (3d Cir. 1947). Since COGSA and the Pomerene Act protect the holder in due course from misleading bills of lading, statements insufficient to avoid liability under COGSA should not be permitted to avoid liability under the Pomerene Act. Moreover, the words "particulars furnished by shipper" fail to indicate that the shipper loaded the cargo, because COGSA presumes

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[4]While the words "shippers weight, load, and count" are absent from the bill of lading, the statute provides for the inclusion of "other words of like purport" to avoid liability for the non-receipt of goods. 49 U.S.C.A. §101 (1951).

the shipper will furnish the particulars placed in the bill of lading by the carrier. 46 U.S.C.A. §1303(3) (West 1975).

[5] The preprinted paragraph in the bill of lading also fails to satisfy the standard in 49 U.S.C.A. §101. The paragraph does not indicate that the shipper loaded the cargo, and therefore, such an attempted disclaimer of liability is ineffective. *See Spanish American Skin Co.*, 242 F.2d at 552-53.

B. The District Court's Holding the M/V "ALBERT V" Liable In Rem

[6-9] A court obtains in rem jurisdiction over a vessel when a maritime lien attaches to the vessel. *Krauss Brothers Lumber Co. v. Dimon SS Corp.*, 290 U.S. 117, 120-21, 54 S.Ct. 105, 106, 78 L.Ed. 216 (1933). A maritime lien attaches against a ship when a valid claim for cargo loss or damage exists. G. Gilmore & C. Black, *The Law of Admiralty*, §8-45 at 165 (1st ed. 1957). The right to the lien attaches "when there is 'union of ship and cargo.'" *Krauss*, 290 U.S. at 121, 54 S.Ct. at 106. When the vessel is loaded, or at least when it is ready to be loaded, the "union of shop and cargo" will occur. *Krauss*, 290 U.S. at 121-22, 54 S.Ct. at 106. The loading of the cargo on the M/V ALBERT F therefore created a maritime lien enforceable in rem to secure the performance of the contract.

The vessel contends, however, that Sanca delivered the wrong goods, and therefore, no maritime lien attached. The district court concluded that the maritime lien attached because appellants were estopped from asserting the delivery of the wrong goods. Since we have affirmed

the district court's ruling with respect to the estoppel issue, we also affirm the ruling holding of the M/V ALBERT F liable in rem. The vessel could not deny the delivery of goods because they were estopped from doing so, and therefore, they must be treated as having the correct goods on board. Therefore, the lien attached when the goods were loaded on the ship, and the district court was correct in holding the M/V ALBERT F liable in rem.

C. The District Court's Denying an Increase in Security and In Limiting Induspapel's Final Judgment

[10] The M/V ALBERT F was released in exchange for Fairwind's posting of a $344,500 security. The effect of the release was to transfer the lien from the ship to the fund the security represented. "The lien against the ship [was] discharged for all purposes and the ship cannot again be liable in rem for the same claim." G. Gilmore & C. Black, *The Law of Admiralty*, § 989 at 651 (1st ed. 1957). *See also, Continental Grain Co. v. Federal Barge Lines, Inc.*, 268 F.2d 240, 244 (5th Cir. 1959), *aff'd*, 364 U.S. 19, 80 S.Ct. 1470, 4 L.Ed.2d 1540 (1960). Induspapel contends that the district court erred in not compelling Fairwind to post additional security because the security had become inadequate as a result of the party's mistaken belief of the anticipated duration of the litigation.

Rule E(6) of the Supplemental Rules to the Federal Rules of Civil Procedure provides that, "[t]he court may, on motion and hearing, for good cause shown, reduce the amount of security given; and if the surety shall be or become insufficient, new or additional sureties may be required on motion and hearing." This provision

fails to give clear guidance to the district courts on when to require additional sureties, but, "it seems reasonably clear that if the vessel is released on too low a bond as the result of fraud, misrepresentation or mistakes sufficient to justify the [vessel's] rearrest, the court can compel additional security to be posted as a precondition to avoiding a rearrest." 7A Moore's Federal Practice, § E.14 at E-710 (2d ed. 1983). "A mistake sufficient to justify rearrest requires that it be tinged with fraud or misrepresentation or that it be the mistake of the court and not that of the claimant." 7A Moore's Federal Practice, § E.14 at E-711 n. 30 (2d ed. 1983).

[11] In this case, the mistake was not tinged with fraud or misrepresentation and was not caused by the district court. The mistake concerned the parties' opinions concerning the duration of the litigation, and while their opinions were incorrect, this mistake is insufficient to compel additional security. Indeed, at the time Induspapel intervened in this case, its claim exceeded the amount of the security that had been posted. Induspapel should have addressed the inadequacy of the security when it first intervened in the suit.

The district court also limited Induspapel's lien to $344,500, the amount of the security Fairwind posted. Induspapel contends that the district court erred in limiting the lien to this amount. Since no fraud or illegalities existed sufficient to justify rearrest, the question is whether Induspapel can obtain an in personam judgment in excess of the amount of the security against Fairwind who secured the vessel's release. "The traditional rule has been that the admiralty court will not give a personal judgment against the owner in excess of the

amount of the release bond." G. Gilmore & C. Black, *The Law of Admiralty*, § 9-90 at 652 (1st ed. 1957). This rule, however, appears to be changing. In *The Fairisle*, 76 F.Supp. 27 (D.Md.1947), *aff'd sub non., Waterman S.S. Corp. v. Dean*, 171 F.2d 408 (4th Cir.1948), the district court granted judgment for $45,000 after the ship had been released on a $25,000 bond. The district court held that the award in excess of the bond was proper because the bond was not determined in relation to the value of the vessel, and the parties had not agreed to the value of the bond. *Id.* at 32. Utilizing its equitable powers, the district court granted an award in excess of the bond. *Id.* at 34. *See also, The Minnetonka*, 146 F. 509 (2d Cir.1906), *cert. denied sub nom., Atlantic Transport Co. v. Barnes*, 203 U.S. 589, 27 S.Ct. 777, 51 L.Ed. 330 (1906) (ship released for $5,000, the purported value of jewelry stolen on the ship. Subsequently, jewelry was determined to be worth more, and the second circuit awarded the plaintiff the full value of the jewelry).

[12] The present case does not involve any mistake in determinations concerning the value of the ship. Both parties agreed to the initial estimation. Therefore, we find the district court acted properly in prohibiting an award in excess of the $344,500 security. *See Logue Stevedoring Corp. v. The Dalzellance*, 198 F.2d 369, 372-73 (2d Cir.1952) (adhering to the traditional rule that an in rem action could not be converted to an in personam action). *See also*, G. Gilmore & C. Black, *The Law of Admiralty*, § 9-90 at 654 (1st ed. 1957).

The judgment of the district court is affirmed.

AFFIRMED.

[FILED JUL -9 1984]

IN THE UNITED STATES COURT OF APPEAL
FOR THE ELEVENTH CIRCUIT

NO. 82-5865

INDUSTRIA NACIONAL DEL PAPEL, CA.,
Plaintiff-Appellee,
Cross-Appellant,

SANCA STEEL CORP.,
Intervening Plaintiff,

FAIRWIND CONTAINER,
Counter Claimant-Appellant.
Cross-Appellee,

versus

M/V "ALBERT F", In Rem, Etc.,
Defendant,

SANCA STEEL CORP., ET AL.,
Counter Defendants.

Appeal from the United States District Court
for the Southern District of Florida

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion April 20, 11 Cir., 1984, ____ F.2d ____).

(JUL -9 1984)

Before HILL and HATCHETT, Circuit Judges, and ALLGOOD*, District Judge.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ [illegible]
United States Circuit Judge

*Honorable Clarene W. Allgood, U.S. District Judge for the Northern District of Alabama, sitting by designation.

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FILED
OCT 26 1984
ALEXANDER L. STEVAS
CLERK

(2)

CASE NO. 84-554

in the Supreme Court of the United States

INDUSTRIA NACIONAL DEL PAPEL, C.A.,
Respondent,

vs.

M/V "ALBERT F", In Rem,
Petitioner

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, ELEVENTH CIRCUIT

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28 pp

QUESTIONS PRESENTED FOR REVIEW

I

WHERE A VESSEL ISSUES A CLEAN ON BOARD BILL OF LADING DESCRIBING CARGO AND OUTTURNS CARGO WHICH DOES NOT CONFORM TO THAT DESCRIPTION, IS THE VESSEL ESTOPPED TO IMPEACH THE DESCRIPTION CONTAINED IN THE BILL OF LADING AS AGAINST A CONSIGNEE WHICH PAID VALUE FOR THE BILL IN GOOD FAITH RELIANCE ON THE DESCRIPTION THEREIN.

II

WHERE THERE IS NO CONFLICT BETWEEN COGSA AND THE POMERENE ACT, IS CERTIORARI REVIEW APPROPRIATE WHERE THE LOWER COURT APPLIED THE PLAIN LANGUAGE OF COGSA AND THE POMERENE ACT AND OBTAINED A RESULT IN ACCORDANCE WITH ALL OTHER FEDERAL CIRCUIT COURT DECISIONS ON THE SAME ISSUE.

III

IS CERTIORARI REVIEW PROPER WHERE THERE HAS BEEN NO OBJECTION TO THE FINDINGS OF FACT OF THE LOWER COURT, AND WHERE THE LOWER COURT MERELY APPLIED THE PLAIN LANGUAGE OF COGSA AND THE POMERENE ACT AND OBTAINED A RESULT WHICH DOES NOT CONFLICT WITH ANY DECISIONS OF THIS COURT NOR ANY OTHER FEDERAL COURT ADDRESSING THE SAME ISSUES.

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JURISDICTIONAL STATEMENT

Respondent believes this Honorable Court should, in the proper exercise of its discretion, deny this Petition for Writ of Certiorari.

A. The decision of the lower court is in accordance with District and Circuit Court opinions addressing the same issues, and does not conflict with any decisions of this Court.

B. Further review is unnecessary where the construction placed upon the statutes by the lower court is based on the plain language of the statutes as supported by legislative history and the weight of judicial authority.

C. There exists no constitutional, statutory nor judicial authority which supports Petitioner's position.

STATUTES INVOLVED IN THE CASE

Statutes cited in the opinion sought to be reviewed and in this Petition are the following:

1. Section 1303(3)(c), of the Carriage of Goods by Sea Act (COGSA), 46 U.S.C.A. Section 1300-1315 (West 1975).

"(3) After receiving the goods into his charge the carrier, or the master or agent of the carrier, shall, on demand of the shipper, issue to the shipper a bill of lading showing among other things—

(c) The apparent order and condition of the goods: *Provided*, that no carrier, master, or agent of the carrier, shall be bound to state or show in the bill of lading any marks, number, quantity, or weight he has reasonable ground for suspecting not accurately to represent the goods actually received, or which he has had no reasonable means of checking."

2. Section 1303(4), COGSA:

"Bill as prima facie evidence

(4) Such a bill of lading shall be prima facie evidence of the receipt by the carrier of the goods as therein described in accordance with paragraphs (3)(a), (b) and (c), of this section: *Provided*, That nothing in this chapter shall be construed as repealing or limiting the application of any part of sections 81 to 124 of Title 49."

3. Section 1304(5), COGSA:

"Amount of liability; valuation of cargo

(5) * * * *

Neither the carrier nor the ship shall be responsible in any event for loss or damage to or in connection with the transportation of the goods if the nature or value thereof has been knowingly and fraudulently misstated by the shipper in the bill of lading."

4. Section 21 of The Federal Bills of Lading (Pomerene) Act, 49 U.S.C.A. 81-124 (West 1951).

"Section 101. Loading by shipper; contents of bill; ascertainment of kind and quantity on request.

When package freight or bulk freight is loaded by a shipper and the goods are described in a bill of lading merely by a statement of marks or labels upon them or upon packages containing them, or by a statement that the goods are said to be goods of a certain kind or quantity, or in a certain condition, or it is stated in the bill of lading that packages are said to contain goods of a certain kind or quantity or in a certain condition, or that the contents or condition of the contents of packages are unknown, or words of like purport are contained in the bill of lading, such statements, if true, shall not make liable the carrier issuing the bill of lading, although the goods are not of the kind or quantity or in the condition which the marks or labels upon them indicate, or of the kind or quantity or in the condition they were said to be by the consignor. The carrier may also by inserting in the bill of lading the words "Shipper's weight, load, and count," or other words of like purport, indicate that the goods were loaded by the shipper and the description of them made by him; and if such statement be true, the carrier shall not be liable for damages caused by the improper loading or by the nonreceipt or by the misdescription of the goods described in the bill of lading: *Provided, however,* Where the shipper of bulk freight installs and maintains adequate facilities for weighing such freight, and the same are available to the carrier, then the carrier, upon

written request of such shipper and when given a reasonable opportunity so to do, shall ascertain the kind and quantity of bulk freight within a reasonable time after such written request, and the carriers shall not in such cases insert in the bill of lading the words "Shipper's weight," or other words of like purport, and if so inserted contrary to the provisions of this section, said words shall be treated as null and void and as if not inserted therein."

5. Section 22, The Pomerene Act:

"Section 102. Liability for nonreceipt or misdescription of goods.

If a bill of lading has been issued by a carrier or on his behalf by an agent or employee the scope of whose actual or apparent authority includes the receiving of goods and issuing bills of lading therefor for transportation in commerce among the several States and with foreign nations, the carrier shall be liable to (a) the owner of goods covered by a straight bill subject to existing right of stoppage in transitu or (b) the holder of an order bill, who has given value in good faith, relying upon the description therein of the goods, or upon the shipment being made upon the date therein shown, for damages caused by the nonreceipt by the carrier of all or part of the goods upon or prior to the date therein shown, or their failure to correspond with the description thereof in the bill at the time of its issue."

SUMMARY OF THE ARGUMENT

The bill of lading issued on behalf of the M/V "ALBERT F" is subject to the provisions of the Carriage of Goods by Sea Act and the Pomerene Act since the carriage originated in the United States, destined for a foreign port.

Section 22 of the Pomerene Act (49 U.S.C. §102) estops the vessel from denying receipt of the goods specified in the clean on board bill of lading as against INDUSPAPEL, which paid value in good faith reliance on the representations contained in the bill of lading.

The vessel did not avoid the effect of §22 in the manner permitted by §21 of the Pomerene Act (49 U.S.C. §101) and the Carriage of Goods by Sea Act.

The Carriage of Goods by Sea Act provides that where there is doubt as to the accuracy of the description of goods given by a shipper, a vessel may avoid liability by not placing the description supplied in the bill of lading. The M/V "ALBERT F" failed to do this.

Section 21 of the Pomerene Act provides that estoppel under §22 may be avoided where cargo was loaded by the shipper, by marking the bill of lading "shipper's weight, load, and count". The language in the clean on board bill of lading is insufficient to avoid estoppel under §22.

The vessel being properly estopped to deny receipt of the cargo described in the vessel's clean on board bill of lading, INDUSPAPEL is entitled to a maritime lien for the vessel's failure to deliver those goods.

The factual findings supporting the District Court's conclusions of law are not disputed by the Petitioner and the Eleventh Circuit properly affirmed the Final Judgment based on the vessel's estoppel to deny its receipt of the goods described in the clean on board bill of lading.

STATEMENT OF THE CASE

Respondent, INDUSTRIA NACIONAL DEL PAPEL (INDUSPAPEL) ordered 1500 metric tons of softwood kraft pulp from SANCA STEEL CORPORATION (SANCA), the Shipper. INDUSPAPEL obtained the issuance of an irrevocable letter of credit which was payable upon presentation of sight drafts accompanied by full sets of clean on board bills of lading. Cargo was loaded on the vessel and a clean on board bill of lading was issued by the master on behalf of the vessel describing the cargo as 1,035 bales of softwood kraft pulp, consisting of 854.91 metric tons.

Upon departure of the vessel from Florida, SANCA presented the original clean on board bill of lading and the other documents required under the letter of credit. In reliance on the clean on board bill of lading issued by the vessel, INDUSPAPEL's funds in the amount of $324,746.11 were drawn under its letter of credit. Upon arrival of the M/V "ALBERT F", the vessel did not deliver the softwood kraft pulp described in the clean on board bill of lading, but rather, it outturned 505 bales of practically worthless waste paper.

INDUSPAPEL instituted an *in rem* action against the M/V "ALBERT F" in the United States District

Court for the Southern District of Florida for the nondelivery. The District Court ruled for INDUSPAPEL holding that the vessel was estopped from impeaching the clean on board bill of lading, and therefore, was liable in rem for the nondelivery of the cargo specified in the bill of lading.

FAIRWIND CONTAINER EXPRESS, LTD. (FAIRWIND), claimant owner of the M/V "ALBERT F", appealed to the Court of Appeals for the Eleventh Circuit which affirmed the final judgment of the District Court. *Industria Nacional del Papel C.A. v. M/V "ALBERT F"*, 730 F.2d 622 (11th Cir. 1984). FAIRWIND's subsequent petition for rehearing and/or suggestion for rehearing en banc was denied, and FAIRWIND has now petitioned for writ of certiorari to the United States Court of Appeals, Eleventh Circuit.

ARGUMENT

I

The clean on board bill of lading constituting the contract of carriage issued on behalf of the M/V "ALBERT F" was for carriage of goods in foreign trade to the Dominican Republic. Pursuant to the terms of the bill of lading and the provisions of the Carriage of Goods by Sea Act of 1936 (COGSA), 46 U.S.C. §1300, *et seq.*, COGSA governs the responsibilities and liabilities of the vessel. 46 U.S.C. §§1300, 1302-1303. COGSA explicitly preserves the effect of the provisions of the Pomerene Bills of Lading Act of 1916, 49 U.S.C. §§81-124. 46 U.S.C. §1303(4). Those provisions are applicable since the clean on board bill of lading was issued in the State of Florida. 49 U.S.C. §81.

Based upon findings of fact to which petitioner has not objected, the Eleventh Circuit Court held that since the M/V "ALBERT F" received certain goods and issued a bill of lading describing them, there was a union of ship and cargo which created a maritime lien enforceable *in rem* to secure the performance of the contract of carriage. The Eleventh Circuit further found that since the goods received by INDUSPAPEL did not conform to the goods described in the bill of lading upon which INDUSPAPEL had relied, the M/V "ALBERT F" was estopped, in accordance with §22 of the Pomerene Act, from denying receipt of the goods and from asserting delivery of the wrong goods.

Petitioner asserts that there existed no maritime lien in the instant case due to the absence of a union of cargo and ship. At the heart of this assertion is the argument that the estoppel principle enunciated in §22 of the Pomerene Act, which estops a carrier from denying receipt of goods specified in a clean on board bill of lading as against a good faith purchaser, is inapplicable in actions *in rem* where the carrier never receives cargo.

Petitioner's position is without merit for the simple reason that this case does not involve a carrier which failed to receive cargo; it involves a carrier which received cargo but issued a clean on board bill of lading which misdescribed that cargo. It involves precisely the situation which Congress intended to regulate in enacting the Pomerene Act, and it involves precisely the situation for which the Pomerene Act provides a valid claim for cargo loss or damage to a good faith purchaser for value of the clean on board bill of lading against the

issuing carrier, who is estopped to impeach the bill of lading.

Petitioner simply glosses over the District Court's finding that cargo was in fact loaded onto the M/V "ALBERT F", and that the M/V "ALBERT F" issued a clean on board bill of lading upon receipt of that cargo which misdescribed the cargo. By sailing with the goods it received and carried under the clean on board bill of lading, destined for INDUSPAPEL in the Dominican Republic, the M/V "ALBERT F" ratified the bill of lading. *DEMSEY & ASSOCIATES v. S.S. "SEA STAR"*, 461 F.2d 1009 (2d Cir. 1972), and *BRITISH WEST INDIES PRODUCE, INC. v. S/S "ATLANTIC CLIPPER"*, 353 F.Supp. 548 (S.D.N.Y. 1973). At no time has Petitioner ever objected to this or any other finding of fact.

The Circuit Courts have consistently held the doctrine of estoppel applicable in cases where a clean on board bill of lading contained misdescriptions of the goods. Prior to the enactment of the Pomerene Act, a substantial body of law already existed holding carriers liable to consignees and assignees for value for misrepresentations in bills of lading issued by them. *See, THE CARSO*, 43 F.2d 736 (S.D.N.Y. 1930), *aff'd. in part and rev'd. in part*, 53 F.2d 374 (2d Cir. 1931) and *OLIVER STRAW GOODS CORP. v. OSAKA SHOSEN KAISHA*, 27 F.2d 129 (2d Cir. 1928), *cert. denied*, 278 U.S. 618, 49 S.Ct. 22, 73 L.Ed. 540 (1928). Liability in those cases was predicated upon estoppel of the carrier to deny representations of the receipt, description, and condition of goods made in bills of lading. The cases held the estoppel to be, in effect, a conclusive admission of nonexistent fact which precluded the carrier and the vessel from introducing evidence to impeach the

misrepresentation in the bill of lading. *THE CARSO*, *supra.*, 53 F.2d at 378.

Section 22 of the Pomerene Act codified the estoppel principle which developed under the earlier decisional law, *PORTLAND FISH CO. v. STATES STEAMSHIP CO.*, 510 F.2d 628, 631 (9th Cir. 1974). Since the enactment of the Pomerene Act, the Circuits have consistently applied the estoppel principle thereby holding the carrier liable in cases of misdescription. In *PORTLAND FISH COMPANY v. STATES STEAMSHIP COMPANY*, *supra*, the carrier was found liable for misdescriptions in the weight of a cargo of tuna. Similarly, in *ELGIE & CO. v. S.S. "S.A. NEDERBURG"*, 599 F.2d 1177 (2d Cir. 1979), *cert. denied*, 444 US 1072, 100 S.Ct. 1016, 62 L.Ed.2d 753 (1980), the carrier was found liable under its bill of lading since it failed to "accurately describe the shipment of eleven cartons by calling it eleven cartons and a crate and that it misrepresented the shipment in so doing". 599 F.2d at 1180. Petitioner itself points out that the estoppel principle has been applied in cases finding a vessel liable *in rem* for misdescriptions contained in the bill of lading. See *DEMSEY AND ASSOCIATES v. S.S. SEA STAR*, *supra.* wherein clean bills of lading were issued for excessively rusted and pitted steel coils; and also *THE CAPITAINE FAURE*, 10 F.2d 950 (2d Cir. 1926), wherein the vessel became bound by its description of cargo in bills of lading.

The theory of liability applied in these cases is precisely the theory which the Eleventh Circuit Court followed in affirming the District Court's decision. The M/V "ALBERT F" received cargo and misdescribed that cargo in a clean on board bill of lading. The M/V "ALBERT F" was properly estopped from impeaching

that bill of lading since INDUSPAPEL gave value in good faith relying upon the representations in that bill of lading.

Insofar as a union between vessel and cargo may be required, there can be no question that the bill of lading was executed, not executory. Cargo was put on board, a clean bill of lading was issued by the vessel and goods were outturned which failed to conform to the bill of lading. That is precisely the situation §22 of the Pomerene Act was intended to encompass. The vessel had the opportunity to verify the information provided by the shipper and issue a disclaimer on the bill of lading; however, the vessel failed to avail itself of the protection provided under COGSA and the Pomerene Act. It issued the bill of lading clean on board without exceptions. The contract of carriage was executed by the vessel and it is bound by its misdescription of the goods in the bill of lading and estopped from asserting, as a defense, that it did not receive the goods specified in the bill.

Assuming arguendo that no cargo was received by the M/V "ALBERT F", *in rem* liability of the M/V "ALBERT F" for damages suffered by INDUSPAPEL was nevertheless properly predicated under §22 of the Pomerene Act, since the vessel was estopped to deny receipt of the goods it represented it received in the clean on board bill of lading. Congress' intent in enacting §22 was to place liability on the carrier for goods receipted for by its representatives, even though they may not actually have been received by the carrier. Where a consignee or assignee of a bill of lading has changed his position in reliance thereon, estoppel applies and a maritime lien is imposed against the vessel even though

the cargo was never delivered to it. 1 *BENEDICT ON ADMIRALTY*, §185, p.11-16 (6th ed. 1981).

The effect of §22 was preserved in COGSA for the specific purpose of preventing frauds such as that practiced upon INDUSPAPEL in the case at bar. The legislative history demonstrates that intent:

> Prior to the enactment of the Pomerene Act, a number of cases had arisen in which shippers had induced representatives of common carriers to sign bills of lading receipting for illustration for a certain number of bales of cotton, on the shipper's assurance that the cotton would later be delivered to the carrier. The shipper would then dispose of the bill of lading through the usual discounting procedure. Sometimes with intent to defraud and sometimes merely through financial inability as a result of rise in price, and shipper would fail to deliver the cotton. The courts held the fact that the goods had not actually been received to be an adequate defense to relieve the common carrier of liability. This loophole led to frauds on a large scale until the Pomerene Act finally made them impossible by providing that the carrier shall be liable for goods receipted for by its representatives, even though they may not actually have been received. All interests concerned appear to agree upon the importance of preserving this effect of the Pomerene Act. S. Rep. 742, 74th Cong., 1st Sess. (1935).

Further evidence of Congress' intent appears in cases enunciating the common law estoppel principle

which Congress codified in §22. In *OLIVER STRAW GOODS CORP, supra*, a letter of credit was honored based upon a clean on board bill of lading issued for goods which were never loaded aboard the "ALASKA MARU". The carrier was held estopped, as against the endorsee of the bill of lading, to deny its representation in the bill that the goods were shipped aboard the vessel. The court held that:

> When a carrier has given a clean bill of lading, stating that cargo has been received in good order, though it was at the time manifestly damaged, the courts hold that it is estopped to deny the truth of the assertion against a purchaser of the bill of lading, who has been misled by the representation and has altered his position to his detriment on the faith of the representation. (Citations omitted). *We can see no difference in principle between a misrepresentation as to the condition of merchandise and a misrepresentation that it is on board, when it is not.* Either furnishes a basis for an estoppel. (Emphasis added). *OLIVER STRAW GOODS CORP. v. OSAKA SHOSEN KAISHA, supra.*, 27 F.2d at 133.

Recent decisions reflect the complete unanimity among the courts in applying §22, and further reflect Congress' intent to preserve and codify the estoppel principle. See *ELGIE & CO.; supra; PORTLAND FISH CO., supra; GENERAL FOODS CORP. v. "THE FELIPE CAMARO"*, 172 F.2d 131 (2nd Cir. 1949); and *HOLDEN v. S.S. "KENDALL FISH"*, 212 F.Supp. 106 (E.D. La. 1962).

Under these cases, decided under COGSA and the Pomerene Act, absolutely no legitimate distinction can be made between holding a vessel liable by estoppel for goods never loaded where the goods were described in a clean bill of lading, and holding it liable by estoppel for goods loaded but misdescribed in a clean bill of lading. In both cases, carriage of cargo has ostensibly been performed pursuant to the bill of lading issued, and in both cases the bill of lading misrepresented what was outturned from the vessel. To conclude that the bill of lading in the first instance is executed, but only executory in the second, is inconceivable. Carriage of cargo was conducted pursuant to contract in both instances.

Secton 22 was intended to override the decisions in *FRIEDLANDER v. TEXAS & PACIFIC R.R. CO.*, 130 U.S. 416, 9 S.Ct. 570, 32 L.Ed. 991 (1889); *POLLARD v. VINTON*, 105 U.S. 7, 26 L.Ed. 998 (1881); and *THE SCHOONER "FREEMAN" v. BUCKINGHAM*, 59 U.S. (18 How.) 182, 15 L.Ed. 341 (1856), which limited the estoppel doctrine by holding that a carrier's agent had no implied authority to issue a bill of lading absent receipt of the goods described in it. *GLEASON v. SEABOARD AIR LINE RAILWAY.*, 278 U.S. 349, 49 S.Ct. 161, 73 L.Ed. 415 (1929). Section 22 legislatively "reversed" the *FRIEDLANDER* line of cases by precluding a carrier from avoiding liability by showing nonreceipt of the goods described in a clean bill of lading, as against a person who, in reliance upon the representations in the bill, paid value or otherwise altered his position to his detriment. *PACIFIC MICRONESIAN LINES, INC. v. NEW ZEALAND INS. CO., LTD.*, 366 F.2d 332 (9th Cir. 1966). Those are precisely the operative facts and holdings determined by the

District Court and affirmed by the Eleventh Circuit Court of Appeals.

II

Petitioner's assertion that the Eleventh Circuit decision sought to be reviewed establishes a conflict between the Pomerene Act and COGSA fails to withstand analysis of the statutes, legislative history or case law. The crux of Petitioner's argument is that only one section of COGSA is to be read as not limiting or repealing the effect of the Pomerene Act. Petitioner suggests that because the express provision contained in §1303(4) does not appear in any other section of COGSA, that provision applies only to §1303(4). Clearly, such an assertion is unwarranted considering the plain language in §1303(4) which reads as follows:

> . . . *Provided*, That nothing in this *chapter* shall be construed as repealing or limiting the application of any part of sections 81 to 124 of Title 49. (Emphasis added)

The reference in this section to "chapter" makes it abundantly clear that nothing in *all* of Chapter 28 of Title 46, entitled Carriage of Goods by Sea, is to be construed as repealing or limiting the application of the Pomerene Act. In considering the legislative history of COGSA, as read in conjunction with the Pomerene Act, the Ninth Circuit Court of Appeals in *PORTLAND FISH COMPANY* stated that "section 3(4) of COGSA, 46 U.S.C. §1303(4), expressly prohibits a construction of COGSA which would limit or repeal the effect of the Pomerene Act." The legislative history cited in *PORTLAND FISH COMPANY* reflects that Congress

intended to prevent frauds such as that practiced upon INDUSPAPEL by expressly providing for the preservation of the Pomerene Act:

> S. Rep. 742, 74th Cong., 1st Sess. (1935) contains the following explication of the provision in section 3(4) of COGSA at 1-2:
>
> > The [proviso] is intended to preserve in effect the provisions of the Pomerene Act which hold a carrier liable for receipt of goods signed for by its representatives even though they may not actually have been received, this provision of the Pomerene Act having been found necessary to prevent abuses that were being practiced with damages resulting due to the negotiable character of the bill of lading.

510 F.2d at 632 (FN 8). Clearly, *all* of COGSA is to be read against the backdrop of the Pomerene Act.

One of the primary purposes of COGSA was the establishment of uniformity and negotiability in bills of lading. *PORTLAND FISH COMPANY*, *supra*, 510 F.2d at 631. One of the key mechanisms by which negotiability is enhanced by COGSA is via the incorporation of duties imposed upon carriers by §22 of the Pomerene Act. As a guarantee that good faith purchasers of bills of lading would be delivered goods which the bill of lading said would be delivered, Congress put the onus on the carrier to guarantee delivery of goods described in the bill of lading. The carrier is in the best position to bear this burden because it issues the bill of lading and is in possession of the goods until delivery. Moreover, both

COGSA and the Pomerene Act also provide a mechanism to protect the carrier's interests.

Section 1303(3)(c) of COGSA provides that where there is doubt as to the accuracy of the description of goods given by a shipper, a vessel may avoid liability by not placing the description supplied in the bill of lading. In addition, §21 of the Pomerene Act provides that estoppel under §22 may be avoided where cargo was loaded by the shipper, by marking the bill of lading "shipper's weight, load, and count". Clearly Congress intended these Acts to work in unison. The vessel's compliance with either Act would have avoided the District Court's application of the estoppel principle which resulted in the vessel's *in rem* liability.

The M/V "ALBERT F" did not avoid the effect of §22 in the manner permitted by either the Pomerene Act or COGSA. The bill of lading issued by the M/V "ALBERT F" contained, on its face, the typed-in description representing that the vessel received 1,035 bales of softwood kraft pulp, consisting of 854.91 metric tons, and the bill clearly states that the goods were received, freight prepaid, clean on board, with no exceptions noted. Furthermore, the M/V "ALBERT F" did not insert "shipper's weight, load and count" in its clean on board bill of lading. The vessel failed to avail itself of the statutory opportunities to exonerate itself from liability, and contrary to Petitioner's assertion, the vessel is certainly not "blameless" as to INDUSPAPEL, which paid value for the bill of lading in good faith reliance on the M/V "ALBERT F's" representations.

For these reasons, the M/V "ALBERT F" is estopped to deny its misstatement of the receipt of 1,035 bales of softwood kraft pulp, consisting of 854.91 metric tons, as it described in the clean on board bill of lading. *ELGIE & CO. v. S.S. "S.A. NEDERBURG"*, *supra.*; *PORTLAND FISH CO. v. STATES STEAMSHIP CO.*, *supra.*; *GENERAL FOODS CORP. v. "THE FELIPE CAMARO"*, *supra.*; *OLIVER STRAW GOODS CORP. v. OSAKA SHOSHEN KAISHA*, *supra.*; and *HOLDEN v. S.S. "KENDALL FISH"*, *supra.*

To accept the M/V "ALBERT F's" argument would emasculate COGSA and §22 of the Pomerene Act. It would permit accomplishment of the very misrepresentation and fraud which the statutory provisions were enacted to preclude.

The Eleventh Circuit properly applied the estoppel principle, taking into consideration the coexistensive provisions of COGSA and the Pomerene Act, and the result of such application is a maritime lien against the M/V "ALBERT F".

The Eleventh Circuit Court committed no error in holding the vessel liable *in rem* for INDUSPAPEL's damages and there is no basis for this Court to review that decision.

III

Although the decision sought to be reviewed does involve the application of federal statutes of import, the issues it addresses are all determined in accordance with applicable decisions of this Court. Moreover, the authority cited by Petitioner fails to demonstrate that

the Eleventh Circuit's decision conflicts with any decision of any other court applying the same federal statutes in similar factual situations. Literally every court applying the coextensive provisions of COGSA and the Pomerene Act at issue have done so in accordance with the Eleventh Circuit's decision.

In order to reverse the District Court's decision and allow the M/V "ALBERT F" to impeach the terms of the bill of lading the Eleventh Circuit would have been required, *sua sponte*, to disturb the District Court's findings, since Petitioner expressly did not object to any of those findings. Reversal of the District Court's decision on these uncontroverted findings of fact would be tantamount to repealing COGSA as well as the Pomerene Act, permitting the accomplishment of the very misrepresentation and fraud which these statutory provisions were enacted to preclude.

There being no constitutional, statutory nor judicial authority for supporting Petitioner's position, this Honorable Court, in the proper exercise of its discretion, should deny the Petition for Writ of Certiorari.

CONCLUSION

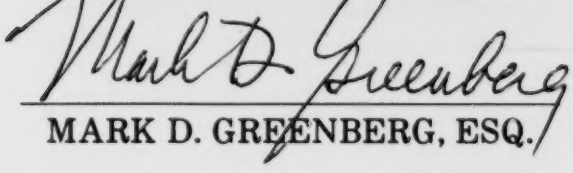
Based upon the statutory and judicial authority supporting the decision of the lower court, Respondent respectfully requests this Honorable Court to deny the Petition for Certiorari.

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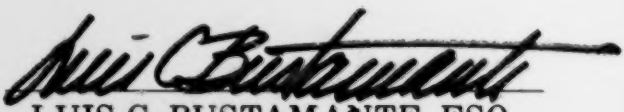
LUIS C. BUSTAMANTE, ESQ.



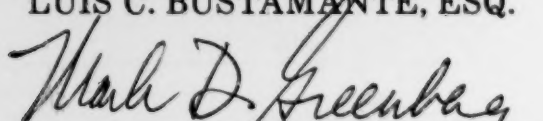
MARK D. GREENBERG, ESQ.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have, on this 24th day of October, 1984, mailed a copy of the above Response to John D. Kallen, Hayden and Milliken, P.A., Attorneys for Petitioner, M/V "ALBERT F", 5915 Ponce de Leon Blvd., Suite 63, Miami FL 33146-2477.



LUIS C. BUSTAMANTE, ESQ.



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